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No. 92-519

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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BOLLEY JOHNSON, ET AL., APPELLANTS

*v.*

MIGUEL DE GRANDY, ET AL.

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA*

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## BRIEF FOR THE UNITED STATES AS APPELLEE

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## QUESTIONS PRESENTED

1. Whether, under this Court's decision in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), a showing that minority group members have been denied an equal opportunity to participate in the political process and to elect representatives of their choice to a statewide legislative body, in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, may be rebutted by evidence that the minority group is proportionally represented in a particular area of the State in which additional minority districts can be drawn, but is not proportionally represented in the State as a whole.

2. Whether the district court's finding that Hispanics are sufficiently numerous and geographically compact to constitute a voting majority in two additional electoral districts for the Florida House of Representatives is clearly erroneous.

3. Whether the Full Faith and Credit Statute, 28 U.S.C. 1738, or the *Rooker-Feldman* doctrine required the district court to give preclusive effect to the Florida Supreme Court's finding that the House plan did not violate Section 2 of the Voting Rights Act.

4. Whether the district court abused its discretion in imposing a court-ordered plan for post-1992 elections without giving the State a greater opportunity to show that the plan interferes with state policy more than necessary to remedy the violation.

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## BRIEF FOR THE UNITED STATES AS APPELLEE

### OPINION BELOW

The opinion of the three-judge district court (J.S. App. 7a-76a)[1] is reported at 794 F. Supp. 1076.

### JURISDICTION

The judgment of the three-judge district court (J.S. App. 1a-3a) was entered on July 2, 1992. No-

[1] The district court's judgments (J.S. App. 1a-6a) and opinion (J.S. App. 7a-76a) are identically paginated in the Appendix to the jurisdictional statement in No. 92-519, *Johnson* v. *De Grandy*, and the Appendix to the jurisdictional statement in No. 92-767, *United States* v. *Florida*. Except where otherwise indicated, all references to the J.S. App. accordingly refer to both appendices.

tices of appeal were filed on July 24, 1992, and July 29, 1992. 92-519 J.S. App. 141a-142a, 143a-144a. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. This Court noted probable jurisdiction on February 22, 1993. 113 S. Ct. 1249.

## STATUTORY PROVISION INVOLVED

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.



## STATEMENT

In response to the 1990 Census, the State of Florida adopted redistricting plans for the Florida Senate and the Florida House of Representatives. A three-judge district court found that the Senate plan violates the rights of Hispanics and African-Americans under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973. The court, however, then adopted that very plan as a permanent remedy for those violations. The United States and a group of private plaintiffs (the De Grandy plaintiffs) have each appealed from that judgment and have filed briefs in those appeals, *De Grandy* v. *Johnson*, No. 92-593, and *United States* v. *Florida*, No. 92-767. The three-judge court also found that the Florida House of Representatives redistricting plan violates the Section 2 rights of Hispanics and adopted a plan to remedy that violation. House officials challenge that judgment in the instant appeal. This Court consolidated all three appeals and noted probable jurisdiction. 113 S. Ct. 1249 (1993). In this brief, we address the issues raised by the appeal of the House officials.

1. On June 23, 1992, the United States filed suit against the State of Florida, alleging that the State's redistricting plan for the Florida House of Representatives violates Section 2 of the Voting Rights Act, 42 U.S.C. 1973. J.A. 73-79. The United States alleged that the State's plan fragments the Hispanic population in the Dade County area so that Hispanics comprise a majority of the voting age population (VAP) in only nine House districts. J.A. 75. The complaint further alleged that if district lines in the Dade County area "respect[ed] communities of

interests and follow[ed] other nondiscriminatory plan-drawing criteria, Hispanics would constitute a significant voting-age majority of the population in two additional districts." J.A. 76. Citing racially polarized voting and other factors, the complaint alleged that "[u]nder the totality of circumstances, * * * the redistricting plan[] * * * deprive[s] Hispanic citizens * * * in the State of Florida of an equal opportunity to participate in the political process and to elect candidates of their choice to the State Legislature." J.A. 77.

The United States' suit was consolidated with two pending redistricting suits. One had been filed by the De Grandy plaintiffs, who made allegations similar to those made by the United States. The other had been filed by the NAACP and several individuals, who had challenged the plan that predated the 1990 Census. J.S. App. 12a, 18a-20a. A three-judge district court assumed jurisdiction over the consolidated cases. *Id.* at 12a, 19a & n.10.

On June 26, 1992, the United States sought a preliminary injunction against the use of the State's redistricting plan in the upcoming primaries. I Tr. 52-53. Rather than acting on that request, the district court decided to conduct an expedited trial on the merits. J.S. App. 19a.

2. On July 1, 1992, at the conclusion of trial, the district court ruled from the bench in favor of the plaintiffs. In an opinion issued on July 17, 1992, the court explained that ruling. J.S. App. 7a-76a.

a. Applying the framework established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30, 44-45, 48-51 (1986) (see J.S. App. 26a-30a), the district court first found that while the State's plan created nine districts in which Hispanics would constitute



"voting majorities," Hispanics are sufficiently numerous and geographically compact to constitute voting majorities in two additional districts. J.S. App. 40a-41a. In reaching that conclusion, the court relied on a plan introduced by the De Grandy plaintiffs (the De Grandy plan), which contained 11 districts in which Hispanics constitute at least 64% of the VAP. *Id.* at 68a.

The court recognized that, because a significant number of Hispanics are noncitizens, it could not infer that Hispanics constitute a voting majority in the De Grandy districts solely on the ground that Hispanics constitute a majority of the VAP in those districts. J.S. App. 32a, 39a, 40a n.28. Rather, the court concluded that the De Grandy districts contain Hispanic voting majorities because (1) experience from other cases suggests that when Hispanics constitute a VAP supermajority, they are likely to constitute a voting majority; (2) actual election returns in Dade County showed that Hispanic-supported candidates would have won if they had run in the De Grandy districts; and (3) none of the De Grandy districts has such a high concentration of recent immigrants as to call into question the conclusion that Hispanics constitute a voting majority. *Id.* at 32a-40a, 69a-70a.

The court found that the State's plan creates nine rather than 11 majority-Hispanic districts by fragmenting and packing the Hispanic population in Dade County. J.S. App. 43a. Thus, the court found that one district line cut directly through the middle of an Hispanic neighborhood, that a second district was packed with Hispanic voters "to protect a white incumbent" in a nearby district, and that the way the State plan drew the lines in two other districts

"repeated the process of fragmenting Hispanic communities." *Ibid.*

The court found that the De Grandy alternative eliminated the fragmentation and packing without compromising neutral districting principles. In particular, the court found that the De Grandy districts are "relatively compact," regular in shape, and conducive to "effective representation." J.S. App. 43a-44a.

With respect to the second *Gingles* precondition (see 478 U.S. at 51), the district court found that Hispanics are politically cohesive. J.S. App. 44a-47a. The court found that there is a "high degree of political cohesiveness among Cuban voters" and "a sufficient degree of political cohesiveness among [all] Hispanics." *Id.* at 45a, 47a.

Similarly, with respect to the third *Gingles* precondition (see 478 U.S. at 51), the court found that Hispanics have been victimized by bloc voting. In particular, it found that whites and African-Americans usually vote sufficiently as a bloc to defeat the candidates preferred by Hispanics, unless those candidates run from districts in which Hispanics constitute a voting majority. *Id.* at 48a-52a.

In addition, the court cited evidence that Dade County is "profoundly divided" by the competing interests of Hispanics, African-Americans, and whites, each having different social and economic interests. J.S. App. 50a. The tensions among the three groups, the court concluded, have caused "ethnic factors * * * [to] predominate over all other factors in Dade politics." *Id.* at 50a-51a. The court also found substantial evidence of discrimination against Hispanics, including English-only initiatives



and language-based employment discrimination, *id.* at 51a-53a, and concluded that "[t]he record clearly established" that Hispanics have "borne the social, economic and political effects of this discrimination." *Id.* at 53a. Based on those findings, and the satisfaction of the *Gingles* preconditions, the court concluded that "the 'totality of circumstances' show[s] that * * * Hispanic vote dilution exists in Dade County under Florida's House plan." J.S. App. 30a.

b. Immediately after issuing its ruling on liability, the court conducted a remedial hearing. At the hearing, appellants offered a plan that had only ten majority Hispanic districts. The court rejected that plan because it did not fully remedy the violation. J.S. App. 68a-69a. Appellants then offered a second plan. That plan had 11 districts in which Hispanics constituted a supermajority of the VAP, but two of the districts had high concentrations of recent immigrants and Hispanic VAPs of only 61%. *Id.* at 69a. The court concluded that Hispanics would not constitute a voting majority in those two districts, and it rejected appellants' second plan on that basis. *Id.* at 69a-70a.

The De Grandy plaintiffs presented a modified version of their original plan. J.S. App. 70a. Like the original, the modified De Grandy plan had 11 districts in which Hispanics constituted a voting majority. *Ibid.* The court explained, however, that the modified plan "sought to respect the policy choices of the state of Florida by merging the De Grandy remedy for South Florida into the existing Florida plan." *Ibid.* The court recognized that the modified plan made adjustments in the State's plan north of the Dade County area, but it found that those changes were both "minor" and necessary to comply with

one-person, one-vote requirements. *Id.* at 70a-71a. Appellants, nonetheless, objected to the modified De Grandy plan on the ground that it would interfere with state policy choices outside Dade County.

In response, the United States suggested that the court begin with the 11 Hispanic districts from the original De Grandy plan and then allow the State to draw the remaining districts. J.A. 488, 490. Appellants, however, opposed that proposal as well, J.A. 488-489, and the court recessed. J.A. 500. When the court returned, appellants announced that they would be willing to accept the United States' proposal. *Ibid.* But the court announced that it had "done the best that we can with this case" and adopted the modified De Grandy plan. *Ibid.* The court concluded that the modified De Grandy plan "best remedies the dilution of the Hispanic vote in South Florida." J.S. App. 71a. The court therefore ordered that the 1992 elections be held under the modified De Grandy plan and that that plan also be used for post-1992 elections. *Id.* at 2a.

c. Judge Vinson filed a concurring opinion. J.S. App. 73a-76a. He explained that appellants' argument that Hispanics did not constitute a voting majority in some of the De Grandy plan's districts was based on estimates of Hispanic citizenship rates that were "unreliable" and that "must be viewed with low confidence and with a large range of error." *Id.* at 74a. He added that the plaintiffs had used "a more relevant calculation" to account for citizenship, and had also introduced convincing evidence that Hispanics could elect representatives of their choice in each of the 11 De Grandy districts. *Id.* at 75a.

In joining the court's remedial determination, Judge Vinson observed that neither of appellants' proposed remedial plans "was even close to meeting Section 2's requirements." J.S. App. 75a. He noted that appellants had also been given the opportunity to "draw a plan that incorporated the De Grandy plan for Dade County into the rest of the state," but that appellants had refused to do so. *Id.* at 76a. In Judge Vinson's view, it was "apparent that [appellants] were intent on delaying the adoption of any plan that implemented a true eleven-Hispanic districts House plan for Dade County." *Ibid.* He characterized as "too late" appellants' "belated change o[f] position and announcement" that they would be willing to draw a plan that incorporated the 11 De Grandy districts. *Ibid.*



4. On July 16, 1992, this Court issued a stay of the district court's judgment pending the outcome of this appeal. 92-519 J.S. App. 139a. As a result, the 1992 elections were held under the State's plan.

## SUMMARY OF ARGUMENT

Appellants' principal contention appears to be that the key question in a Section 2 case is whether existing electoral mechanisms "deny a plaintiff class *equal* electoral opportunity." Br. 25. We agree with that contention and maintain that the framework this Court set out in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), provides an appropriate analysis to determine whether that standard is satisfied. The *Gingles* framework was applied here, and the district court concluded that plaintiffs proved a Section 2 violation under the totality of the circumstances.

Appellants' only specific quarrel with the *Gingles* framework is that, even if the *Gingles* preconditions are satisfied, a plaintiff ordinarily cannot prove that

a redistricting plan violates Section 2 if it is established that the minority group has achieved or will achieve persistent proportional representation under that plan. Six Members of this Court in *Gingles* accepted that proposition. Far from providing a reason to depart from *Gingles*, such a proportional representation defense is part of the *Gingles* framework and was fully available to appellants in this case.

Appellants cannot and did not, however, establish a proportional representation defense by showing that the State plan provides Hispanics with proportional representation in the Dade County area—that part of the State where additional Hispanic districts could be drawn. As decisions of this Court and the lower federal courts make clear, when a statewide mechanism such as a districting plan for a state legislature is involved, the proper frame of reference for a proportional representation defense is statewide. The gravamen of the vote dilution claim that was alleged and proved in this case was that Hispanics throughout the State did not have an equal opportunity to participate and elect the candidates of their choice because their votes were diluted by racial bloc voting and usual electoral defeat. The fact that minority-controlled districts can be drawn only in the Dade County area has no bearing on the scope of the claim presented.

Appellants charge that a statewide focus must be based on a theory that the interests of Hispanics who do not reside in Hispanic districts will be represented by the legislators elected from Hispanic districts. If that is so, an identical objection can be lodged against appellants' regional theory: the



State's theory depends on the premise that the interests of Hispanics not in the nine Dade County Hispanic districts drawn by the State will be represented by individuals elected from those nine districts. Moreover, appellants' approach is unworkable in practice. If proportional representation is to be measured in some area smaller than that over which the challenged electoral mechanism operates, defendants (or plaintiffs) will virtually always be able to manipulate the area to assure that there is (or is not) proportional representation in that area. Finally, appellants' claim that, based on non-record evidence, they could have prevailed even if the focus were statewide was never presented to the district court, raises a number of legal and factual issues never before litigated, and is thus unripe for consideration by this Court.

Appellants also claim that, because many Hispanics are not citizens and thus are not eligible to vote, the district court committed clear error in finding that 11 districts can be drawn in which Hispanics constitute a voting majority. A census enumeration of the number of citizens—and thus potentially eligible voters—was not available in this case, and the district court properly rejected as unreliable appellants' efforts to estimate such figures. Instead, the district court relied on a number of factors—including but not limited to evidence concerning Hispanic electoral success—to find that Hispanics constitute a voting majority in 11 districts.

The district court properly refused to give preclusive effect to the Florida Supreme Court's ruling that the State's plan did not violate Section 2. The Florida Supreme Court itself conceded that it had not had

the time to conduct the factual analysis required to determine whether the State's redistricting plan violates Section 2. Accordingly, since the issue was not fully and fairly litigated in state court, even those who were parties to the state court proceeding would not be bound by the judgment under ordinary principles of *res judicata* or full faith and credit. And, in any event, the United States was not a party to the state court proceeding and could not be bound by its results.

We agree with appellants that the district court's remedial proceedings in this case were deficient. Having found a violation of Section 2, the district court properly gave the State the opportunity to remedy it. The State submitted two plans, neither of which provided adequate remedies. In light of the severe time constraints under which it was acting, the district court could at that point have adopted the plan proposed by the De Grandy plaintiffs as an interim plan for the upcoming elections. But the district court instead adopted it as a permanent remedy. The district court should not have taken that step without affording the State a fair opportunity to contest the plan's adequacy and conformity to state policy. Accordingly, the case should be remanded to the district court for further remedial proceedings.



## ARGUMENT

### I. THE DISTRICT COURT PROPERLY APPLIED THE TOTALITY OF CIRCUMSTANCES TEST IN FINDING THAT THE STATE'S PLAN VIOLATES THE RIGHTS OF HISPANICS UNDER SECTION 2 OF THE VOTING RIGHTS ACT

#### A. The *Gingles* Framework Is Equally Applicable To Challenges To Single-Member District Plans

In *Gingles*, this Court held that a minority group challenging a multimember district as a violation of Section 2 of the Voting Rights Act must show that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) "it is politically cohesive;" and (3) the "majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." 478 U.S. at 50-51. Once those preconditions have been established, a court must then consider other relevant factors to determine whether, under the totality of circumstances, minority group members have been denied an equal opportunity "to participate in the political process and to elect representatives of their choice," 42 U.S.C. 1973 (b). See *Gingles*, 478 U.S. at 77-80. Those circumstances include whether there is a history of discrimination, whether there are socio-economic disparities that affect participation, whether there have been racial campaign tactics, and numerous other factors. *Id.* at 80; see also *id.* at 44-45.

This Court did not decide in *Gingles* whether the same approach should govern challenges to single-member district plans. 478 U.S. at 47 n.12. This Court has since concluded in *Growe* v. *Emison*, 113 S. Ct. 1075, 1084 (1993), however, that the three

*Gingles* preconditions apply to such challenges. The other factors discussed by the Court in *Gingles* as relevant under the totality of circumstances in multimember district cases are equally relevant in this context. Accordingly, the district court in this case appropriately applied the framework this Court set forth in *Gingles*.

Appellants intimate (Br. 23-26) that plaintiffs who challenge single-member district plans should have to satisfy a stricter standard than those who challenge multimember districts. But they do not describe the content or nature of the standard that they have in mind. Appellants' only concrete suggestion appears to be that a showing that the plaintiff class has the "opportunity to elect preferred candidates in numbers commensurate with the plaintiffs' percentage of the population" should be sufficient to defeat a Section 2 claim. See Appellants' Br. 26.

Insofar as appellants' complaint is that a State's showing of proportional representation should generally defeat a Section 2 claim, that complaint provides no reason to depart from the *Gingles* framework. As appellants recognize (Br. 27), Justice Brennan's opinion in *Gingles* indicated that, absent special circumstances, "persistent proportional representation" is inconsistent with an allegation that a minority group has been denied an equal opportunity to elect candidates of its choice in a multimember district. 478 U.S. at 77. And as appellants also recognize (Br. 27), Justice O'Connor's concurring opinion similarly concluded that persistent proportional representation is entitled to "great weight" under the totality of circumstances and therefore will often preclude a finding of a Section 2 violation. 478 U.S. at 104-105. Because the *Gingles* framework thus already takes into account appellants' only specific concern, they fail to present any reason why the *Gingles* framework is otherwise inadequate in redistricting cases involving single-member districts.



In any event, appellants' general suggestion that Section 2 imposes a stricter standard for challenges to single-member district plans is mistaken. The language of Section 2 does not draw any distinction between challenges to multimember districts and challenges to single-member district plans. Section 2(a) applies categorically to any "voting qualification or prerequisite to voting or standard, practice, or procedure," and Section 2(b) applies with equal generality to "the political processes leading to nomination or election." 42 U.S.C. 1973(a) and (b).

Moreover, in a series of cases decided before Section 2 was amended in 1982,[2] the Fifth Circuit had held that although vote dilution standards "were developed for use in situations involving multimember districts, they have equal application to redistricting schemes making use of single-member districts." *Kirksey* v. *Board of Supervisors*, 554 F.2d 139, 143 (5th Cir.) (en banc), cert. denied, 434 U.S. 968 (1977); see also *Robinson* v. *Commissioners Court*, 505 F.2d 674, 678 (5th Cir. 1974); *Howard* v. *Adams County Board of Supervisors*, 453 F.2d 455, 458 n.2 (5th Cir.), cert. denied, 407 U.S. 925 (1972). The legislative history of the 1982 amendments to Section 2 makes clear that Congress intended to codify the approach set forth in those decisions. S. Rep. No. 417, 97th Cong., 2d Sess. 32 (1982).

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[2] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 134; see *Gingles*, 478 U.S. at 35.

No court has ever held that a stricter standard should govern challenges to single-member district plans. This Court noted in *Growe*, 113 S. Ct. at 1084, that multimember districts generally pose a greater danger of dilution than single-member districts.[3] But that observation simply suggests that challenges to multimember districts may be more likely to succeed than challenges to single-member district plans. It does not suggest that a different standard should be used to determine whether dilution has been proven.

In any event, once a court determines that a single-member district plan fragments a minority population community, the distinction between multimember district and single-member district cases vanishes. The district court in this case made precisely such a finding, see J.S. App. 43a, and appellants have not challenged that finding as clearly erroneous. As the Fifth Circuit noted in *Kirksey*, 554 F.2d at 149, a single-member district plan that fragments a geographically concentrated minority community in a setting where bloc voting is prevalent has the same inherent tendency to dilute the minority's voting strength as would a multimember district plan.

### B. The District Court Did Not Apply A Maximization Standard

Appellants next argue (Br. 28-29) that the district court's liability determination is premised on the view that Section 2 requires a State to maximize a minority group's voting strength. Appellants are mistaken. The district court's liability determination reflects a straightforward application of Section 2's totality-of-circumstances test and this Court's decision in *Gingles*.

The district court began its analysis by carefully applying the three *Gingles* preconditions. See 478 U.S. at 48-51. First, it found that the State's plan fragmented and packed the Hispanic population and that, absent that fragmentation and packing, Hispanics are sufficiently numerous and geographically compact to constitute a majority in two additional single-member districts. J.S. App. 30a-44a. Second, it found that Hispanics are politically cohesive. *Id.* at 44a-47a. And third, it found that, except in districts in which Hispanics constitute a voting majority, non-Hispanics usually vote sufficiently as a bloc to defeat Hispanic-preferred candidates. *Id.* at 48a-52a.

After finding the *Gingles* preconditions satisfied, the district court examined the "totality of circumstances," as required by Section 2(b). It cited evidence that Dade County is "profoundly divided" along racial and ethnic lines, that there is "tension" among Hispanics, whites, and African-Americans, and that "ethnic factors * * * predominate over all other factors in Dade politics." J.S. App. 50a-51a. Such evidence refutes any suggestion that the observed bloc voting patterns are simply a response to particular candidates and that other candidates equally preferred by the minority might be able to attract the support of the majority. *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring in the judgment). It also suggests that candidates elected with-

[3] The district court in *Growe* concluded that single-member district plans should be easier to challenge. See 113 S. Ct. at 1083. Although this Court rejected that position in *Growe* (*id.* at 1084), it did not suggest that single-member district plans should be more difficult to challenge.

out Hispanic support may not be willing to take the interests of Hispanics into account. *Ibid.*

Finally, the court found substantial evidence of discrimination against Hispanics, including English-only initiatives and language-based employment discrimination. J.S. App. 53a. Such evidence is also "supportive of" a finding of vote dilution (*Gingles*, 478 U.S. at 49 n.15, 80), because it "strengthen[s] a court's confidence that minority voters will be unable to overcome the relative disadvantage at which they are placed by a particular districting plan," and "suggest[s] a more general lack of opportunity to participate in the political process." *Id.* at 93 (O'Connor, J., concurring in the judgment).

Based on those findings, the district court concluded that plaintiffs had satisfied each of the *Gingles* preconditions and that the "totality of circumstances" showed that the State's plan dilutes the voting strength of Hispanics in violation of Section 2. J.S. App. 30a. In short, the district court properly followed the approach set forth by this Court in *Gingles*.

### C. The District Court Correctly Rejected Appellants' Proportional Representation Defense

Appellants' sole basis for their claim that the district court applied a maximization standard is that the court did not accept their proportional representation defense. That defense is premised on the fact that 45% (nine out of 20) of the districts drawn in the Dade County area contain Hispanic voting majorities, and Hispanics constitute approximately 45% of the voting age population in the same Dade County area. See Appellants' Br. 29. According to appellants, the State's districting plan promises proportional representation in the Dade County area, and



such proportional representation constitutes a complete defense to the plaintiffs' Section 2 claims.

We agree that persistent proportional representation is generally a defense to a Section 2 claim. See *Gingles*, 478 U.S. at 77 (opinion of Brennan, J.); *id.* at 102 (O'Connor, J., concurring in the judgment). And we also agree that such a defense can be based on the likely effects of a plan that has not yet been put into effect, just as it can be based on the actual results of past elections. But appellants have selected the wrong frame of reference in mounting a proportional representation defense.

When a dilution challenge to the redistricting of a statewide body is presented, any defense based on proportional representation must be statewide as well. Appellants did not assert below that there would be statewide proportional representation. Nor did they offer evidence that would support that conclusion. Accordingly, the district court properly rejected appellants' proportional representation defense.

#### 1. *Proportional Representation Should Be Measured On A Statewide Basis*

a. In vote dilution cases under Section 2 of the Voting Rights Act, minority voters in the political jurisdiction whose voting practice is challenged often live outside the majority-minority districts that may be drawn to remedy a violation. But that does not mean vote dilution cases are brought only on behalf of those minority voters who reside in whatever remedial districts ultimately are drawn. The votes of all minority voters in the jurisdiction are diluted due to the combination of racially polarized voting and the State's failure to draw minority districts where such districts are possible. When a violation is found, a court draws minority districts

that include only some of the minorities in the political jurisdiction, but that remedies vote dilution throughout the jurisdiction. *McGhee* v. *Granville County*, 860 F.2d 110, 118-119 & n.9 (4th Cir. 1988); *Campos* v. *City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), cert. denied, 492 U.S. 905 (1989); *Gomez* v. *City of Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989).

As the Fourth Circuit explained in *McGhee*, "the claim of dilution * * * is made by a class consisting of *all* the [minority] voters of the jurisdiction," even though "not all can be placed in safe districts." 860 F.2d at 118 n.9. "That not all can be given the remedy of assured *direct* representation," the Fourth Circuit explained, "does not * * * mean that the remedy is wholly ineffectual as to those not included in 'safe' districts." *Ibid.* Rather, "it must in logic be assumed that the special interests of minority voters not included in safe districts will nevertheless be 'represented,' albeit less directly, by those minority candidates elected from 'safe' districts." *Ibid.* See also *Baird* v. *Consolidated City of Indianapolis*, 976 F.2d 357, 359-360 (7th Cir. 1992) (proportional representation should be determined by the "success by minorities throughout the jurisdiction as a whole"), cert. denied, No. 92-1415 (May 17, 1993); cf. *Wells* v. *Rockefeller*, 394 U.S. 542, 546 (1969) (to comply with one-person, one-vote rule, State must equalize population in districts throughout the State; it is insufficient merely to equalize population only within defined regions of the State).

Thus, the analysis in a case such as this parallels that of *Davis* v. *Bandemer*, 478 U.S. 109 (1986), which involved a claim that state legislative district lines were drawn to dilute the votes of Democrats, in violation of the Equal Protection Clause. The plurality recognized that, although the plaintiffs "cited instances of individual districting within the State which [plaintiffs] believe exemplify * * * discrimination," their claim was "that Democratic voters over the State as a whole, not Democratic voters in particular districts, have been subjected to unconstitutional discrimination." *Id.* at 127 (opinion of White, J.) Two Justices who did not join the plurality agreed: "If Democratic voters in a number of critical districts are the focus of unconstitutional discrimination, * * * the *effect* of that discrimination will be felt over the State as a whole." *Id.* at 169 (Powell, J., concurring in part and dissenting in part).



b. Appellants' contention (Br. 35) that a statewide focus would "effectively read the first *Gingles* requirement—'compactness'—out of the law" is inexplicable. Nothing in our submission supports the conclusion that a district court may draw "non-contiguous districts," as appellants suggest. See Br. 36. To the contrary, our submission is that the district court properly inquired whether plaintiffs could satisfy the compactness requirement set forth in *Gingles* itself and correctly found that they had. See pp. 32-34, *infra*.

The compactness requirement is not intended, as appellants seem to believe (Br. 35-36), to identify which minority group members have had their votes diluted. Rather, it is designed to determine whether the dilution of the minority's votes is caused by the geographic dispersal of the minority population or by the State's failure to draw minority districts. As the Court stated in *Gingles*, "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S. at 50 n.17; see also

*ibid.* ("if the minority group is spread evenly throughout a multimember district, * * * these minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the multimember electoral structure").

c. Appellants' reliance on the treatment of proportional representation in *Gingles* (Br. 36-37) to support their geographically circumscribed proportional representation defense is misplaced. In *Gingles*, plaintiffs alleged that minority voters in particular multimember districts had less opportunity to elect representatives of their choice than did whites in those districts. With respect to one district—District 23—this Court rejected the plaintiffs' claim because they had achieved persistent proportional representation in that district. See 478 U.S. at 77 (opinion of Brennan, J.); *id.* at 102-103 (O'Connor, J., concurring in the judgment). But the plaintiffs in *Gingles* made no claim that the boundaries of District 23 were drawn in such a way as to dilute minority voting strength—a claim that would have been more analogous to the claim the plaintiffs made in this case. Instead, they challenged the mechanism of electing candidates at large from a multimember district, and the Court analyzed whether there was proportional representation within that particular district.[4]

In addition, in light of the plaintiffs' claim in *Gingles*, proof of statewide proportional representation would have been irrelevant. Plaintiffs were asking simply that District 23 be split into single-member districts, in which—as the Court's finding of proportional representation made clear—they would be

[4] Unlike this case, there could thus be no dispute concerning the definition of the area over which there was asserted to be proportional representation. See p. 25, *infra*.



able to achieve roughly the same electoral success as they already had achieved in District 23. Because the acceptance or rejection of the plaintiffs' claim thus would not have affected the extent to which they were proportionally represented statewide, the question whether there was statewide proportional representation was irrelevant.[5]

d. Appellants criticize the statewide approach because in their view it relies on a theory of "virtual representation." See Br. 36 (internal quotation marks omitted). But if that criticism were valid, it would apply equally to the defense appellants raise. As the district court found (J.S. App. 43a), Florida's plan for its House of Representatives fragments Hispanic population concentrations in Dade County such that many Hispanics are in districts in which they are in the minority, rather than the majority. Appellants' version of the proportional representation defense rests on the premise that the fragmentation and consequent diminution in the voting power of *those* Hispanics is acceptable because *other* Hispanics in the Dade County area will be in districts in which Hispanics constitute a majority.

[5] Appellants err in relying (Br. 37 n.60) on this Court's summary affirmance of *Nash* v. *Blunt*, 797 F. Supp. 1488, 1499 (W.D. Mo. 1992), aff'd mem., 113 S. Ct. 1809 (1993). As appellees' motions to dismiss or affirm in that case make clear, there were several grounds for affirmance—including appellants' failure to include any argument in their jurisdictional statement, see 92-1249 Motion of Appellees Blunt and Ashcroft to Dismiss at 18-19; 92-1249 Motion of Appellees Stoff and Weems Intervenors to Dismiss at 4-5—that had nothing to do with the merits of the district court's decision. See *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (summary affirmance determines only those issues that were "necessarily decided").

Thus, appellants' own version of the proportional representation defense appears to rest on the premise that the interests of Hispanics outside the districts in which Hispanics are in the majority will be "represented" in some measure by the House members elected from those districts. If appellants were correct that principles of "virtual representation" are altogether irrelevant under Section 2, their own proportional representation defense would make no sense.

Appellants also assert (Br. 36) that members of the Florida House of Representatives elected by Hispanics in the Dade County area cannot represent the interests of Hispanics elsewhere, who may have different needs. Once again, appellants' own version of the proportional representation defense could be subject to precisely the same criticism: it could be contended that House members elected in the State's nine Hispanic districts in Dade County cannot represent the interests of Hispanics in Dade County who live outside those districts. But, whether applied to Dade County or statewide, appellants' argument misunderstands the underpinnings of the proportional representation defense insofar as the notion of "virtual representation" is concerned. The theory is not that House members elected by Hispanic majorities will represent the interests of Hispanics outside their districts on all issues. Rather, it is that they will tend to do so on those issues that are of special concern to Hispanics, such as English-only initiatives and language-based employment discrimination.

e. A statewide approach to the proportional representation defense is not only firmly grounded in precedent and sound in theory; it also works in practice. A statewide approach provides a clear and objective measure of proportional representation. The same cannot be said of a regional approach. Plaintiffs will almost always be able to define an area in which there is not proportional representation, while defendants will almost always be able to define an area in which there is. For example, in this case, the United States or the De Grandy plaintiffs could have defined the relevant area as the portions of Dade County that do not include the nine Hispanic-majority districts in Florida's House plan. Hispanics have no representation in that area, much less proportional representation. Conversely, appellants could have defined the relevant area as the nine districts in which Hispanics constitute a majority, and then argued that Hispanics are dramatically overrepresented because they control 100% of those districts even though they constitute only 72% of the VAP in that area. See J.S. App. 67a (giving Hispanic VAP of each district).



Appellants' efforts to identify the relevant proportional representation area further illustrates the practical difficulties with a regional approach. In their jurisdictional statement, appellants argued that Dade County was the relevant area for determining proportional representation. See J.S. 18-19. But because the State itself does not follow county lines in redistricting, that definition of the relevant area could not be justified. Appellants now assert that the relevant area is a 20-district area that includes 17 districts in Dade County and three districts that include parts of Dade County and parts of adjacent counties. See Br. 5 n.10, 29. That area is also artificial. It simply reflects the State's choices in

the redistricting process concerning what areas to combine with Dade County and what areas not to combine, without any explanation of why that area—rather than Dade County proper, some portion thereof, a broader region encompassing Dade County, or the State as a whole—is the proper point of reference.

For the foregoing reasons, when plaintiffs make a statewide claim of vote dilution involving a legislative body with statewide jurisdiction, the relevant area for determining a proportional representation defense must be the entire State as well. Any other approach compares apples and oranges.

### 2. *Appellants' Alternative Defense Of Statewide Proportional Representation Was Not Raised In The District Court And Is Not Ripe For Consideration By This Court*

Appellants also contend (Br. 37-38) that, even if a proportional representation defense should be analyzed on a statewide basis, such a defense can be made out in this case. Appellants base that claim on census figures that were not part of the trial record, but that the United States first brought to the attention of the parties in its Motion to Affirm in Part and Vacate In Part (at 14 n.5) in this case.[6] Those figures show that Hispanics constitute 7.15% of the citizen voting age population (CVAP) of Florida. Accordingly, if a plan had been designed to afford

[6] The information we provided the Court comes from a special tabulation of 1990 Census data prepared by the Bureau of the Census in order to assist in the consideration of amendments to the language-minority election requirements of Section 203(b) of the Voting Rights Act, 42 U.S.C. 1973aa-1a(b).



Hispanics representation in proportion to their numbers in the *citizen* voting age population in the State as a whole, it would have eight or nine Hispanic seats (120 × 7.15% = 8.58).[7] Since that is very close to what the State's plan actually provides, appellants contend that the post-trial data provide the basis for a proportional representation defense even on a statewide basis.

As we stated when we initially brought the census figures to the attention of the Court and the parties, we do not believe that it would be appropriate for this Court to reach the question of whether appellants could have made out a proportional representation defense on the basis of the non-record census figures. In the first place, because the data are not in the record and are available at the present time only in an unpublished letter, all of the parties have not had an opportunity to examine the data and litigate whatever issues they believe necessary concerning their interpretation and reliability. Cf. Fed. R. Evid. 201(e). In addition, before appellants could make use of the census figures, it would have to be determined whether they had waived any statewide proportional representation defense based on CVAP and whether the particular facts of this case would warrant a finding of a Section 2 violation irrespec-

[7] By contrast, Hispanics constitute 12.2% of the State's total population and 11.7% of the State's VAP. J.A. 74, Gov't Exh. 6. If a plan had been designed to afford Hispanics representation in proportion to their total population or VAP, it would have 14 or 15 Hispanic seats (120 × 12.2% (or 11.7%) = 14.64 (or 14.04)). The State's plan, however, has only nine districts in which Hispanics constitute a voting majority—far less than proportional representation. J.S. App. 67a.

tive of proof of statewide proportional representation based on CVAP.[8]

More importantly, however, the question whether total population or some other measure is appropriate for measuring proportional representation has never been litigated in this case—or, to the best of our knowledge, in any other case.[9] In *Gingles*, this Court apparently assumed that total population was the correct measure. Although the Court appropriately described the first *Gingles* precondition as a requirement that minority group members show that they could constitute a voting majority in a geographically compact district, 478 U.S. at 50 n.17, it discussed proportional representation in terms of total population. *Id.* at 74 n.35, 77. Before departing from that assumption, a number of legal and practical difficulties with doing so would have to be confronted.

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[8] In *Gingles*, Justice Brennan, joined by one other Justice, noted that "[i]n some situations, it may be possible for § 2 plaintiffs to demonstrate that [persistent proportional representation] does not accurately reflect the minority group's ability to elect its preferred representatives." 478 U.S. at 77. In addition, although Justice O'Connor, joined by three other Justices, stated that proportional representation is "presumptively inconsistent with the existence of a § 2 violation," *id.* at 102, and "as a general rule" is "entitled to great weight," *id.* at 104, she did "not propose that * * * proportional minority electoral success should always, as a matter of law, bar finding a § 2 violation." *Ibid.* See *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975) (proportional representation no defense to Section 5 of the Voting Rights Act where there is proof of purposeful discrimination).

[9] The only case cited by appellants (Br. 38) in support of their argument is *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 945 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989). That case did not involve a proportional representation defense.



In carrying out its redistricting, the State of Florida has chosen to draw legislative districts of roughly equal total population, rather than roughly equal numbers of eligible voters, as it might have done. *Burns* v. *Richardson*, 384 U.S. 73, 92 (1966). In so choosing, Florida has determined to pursue the goal of ensuring that each representative serves the same number of people, so that the people generally have equal representation, rather than the goal of ensuring that voters have an equal impact on elections. See, *e.g.*, *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 531 (1969). Complex issues would be raised by permitting the State, after the fact, to advance CVAP as a measure of proportional representation for the purpose of justifying a level of minority voting strength below that which would exist if the State adhered to the policy on which its redistricting is based—namely measuring representation by total population. As a result of the State's inconsistency, cf. *Kirkpatrick*, 394 U.S. at 530-531, 534-536, it could be argued that Hispanic citizens as a group have *less* representation—since their representatives must represent more *people*—than other citizens in Florida. Cf. *Garza* v. *County of Los Angeles*, 918 F.2d 763, 773-776 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991). Because most states base their redistricting on total population data, a departure from the use of total population for purposes of considering the proportional representation defense would raise serious concerns under the Voting Rights Act.

In addition to legal considerations, there would be substantial practical difficulties with the approach appellants propose. Some individuals are eligible to vote in Florida even though they would be unlikely to have been included in the census figures relied

upon by appellants, and others are ineligible to vote in Florida despite the fact that they were likely to have been included in the census figures.[10] Moreover, if the inquiry were designed to isolate the narrowest definition of "voters," it would be limited to registered (or even actual) voters—a limitation that this Court has consistently rejected in voting rights cases. See, *e.g.*, *City of Rome* v. *United States*, 446 U.S. 156, 186 n.22 (1980); *Ely* v. *Klahr*, 403 U.S. 108, 115 n.7 (1971); *Burns* v. *Richardson*, 384 U.S.

[10] The Census Bureau counts the population of an area in accordance with the "usual residence" rule. See *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, 2772 (1992); *Borough of Bethel Park* v. *Stans*, 449 F.2d 575 (3d Cir. 1971) (explaining and applying rule). Aside from federal employees, see *Franklin* v. *Massachusetts*, *supra*, the Census Bureau count does not include Americans whose usual residence is abroad, except insofar as they may be included by someone filling out a census form in the United States. It does include students, members of the armed forces, and others living in Florida whose legal residence (for voting purposes) is in another State. Cf. *Burns* v. *Richardson*, 384 U.S. at 90-91 & n.18 (discrepancies in districts in which there are substantial military populations).

Under Florida law, a number of groups other than noncitizens are excluded from the franchise, such as convicted felons who have not had their civil rights restored and those adjudged mentally incompetent. Fla. Stat. Ann. § 97.041(3) (West 1982). In addition, the State of Florida permits a person to vote if that person is "a legal resident of Florida and of the county where he wishes to register." Fla. Stat. Ann. § 97.041(1)(a) (West Supp. 1993). Legal residence depends on a bona fide intention to become a resident of Florida to the exclusion of any other State or county. 1971 Ann. Report of Fla. Atty. Gen. 287 (No. 071-202A). Accord, *Herron* v. *Passailaigue*, 110 So. 539, 543 (Fla. 1926); see *Rosenthal* v. *Esquinaldo*, 443 So. 2d 281, 282 (Fla. Dist. Ct. App. 1983) (per curiam), rev. denied, 451 So. 2d 850 (Fla. 1984).



at 92-93. Finally, an unknown number of Hispanics who were noncitizens at the time of the Census were eligible to become citizens and either have become citizens by now or may do so at any time in the future.[11] The question whether the population figures would have to be adjusted to take account of some or all of the above inclusions and exclusions from the electorate—including those based on citizenship—has not been presented to or addressed by the district court.

A further issue is raised by the fact that, as this case illustrates, census CVAP figures are usually unavailable at the time of redistricting. See *Garza* v. *County of Los Angeles*, 756 F. Supp. 298, 1322 (C.D. Cal.), aff'd, 918 F.2d 763 (9th Cir. 1900), cert. denied, 498 U.S. 1028 (1991). To make those figures a central focus of Section 2 litigation would undermine the goals of predictability and prompt resolution of redistricting challenges. Those participating in the redistricting process, including state officials, minority group members, and others, would have no basis for gauging whether various plans afford proportional representation at the time the plans must be drawn, reviewed, and, if necessary, submitted for preclearance pursuant to Section 5 of the Voting

[11] In addition to noncitizens who were eligible for citizenship at the time of the 1990 Census, many noncitizens who were not eligible to become citizens at that time will become eligible over the life of the redistricting plan. In fact, as a result of the amnesty provisions of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201(a)(1), 100 Stat. 3394, there will be a particularly large group of such persons within the next few years. See 8 U.S.C. 1255a(b)(1) (qualified aliens may become lawful permanent residents nineteen months after being granted lawful temporary residence under IRCA); 8 U.S.C. 1427(a) (five years' lawful permanent residence required for naturalization).

Rights Act, 42 U.S.C. 1973. In short, the claim made by appellants should not be litigated for the first time in this Court, especially in the absence of any evidentiary record on which to address it.[12]

### 3. *The United States Alleged And Proved Statewide Vote Dilution In This Case*

Appellants argue (Br. 32) that a statewide focus is inconsistent with the allegations made in our complaint, which in their view "expressly alleged vote dilution in the 20-district 'Dade County area'" and "identif[ied] this 20-district 'Dade County area' as the area in which the alleged vote dilution occurred." Appellants are mistaken.

The complaint does indeed "expressly allege" that the State's plan "fragments" Hispanic population concentrations in the Dade County area. J.A. 75. But it also expressly alleges—in a passage not quoted or discussed by appellants—that that fragmentation "deprive[s] Hispanic citizens * * * *in the State of Florida* of an equal opportunity to participate in the political process and to elect candidates of their choice to the State Legislature." J.A. 77 (emphasis added). The government's closing argument at trial was equally explicit. There, the government stated that "this case is not about Dade County." J.A. 472. It noted that the "State's defense in this case basically boils down to you carve out Dade County from the state of Florida and then you look to see how many districts you can draw in Dade County." J.A. 473. And it took the position that that defense should

[12] As we argue below, this case should be remanded to the district court in any event. At that time, the district court may decide whether it is appropriate to entertain appellants' new statewide proportional representation defense based on CVAP.



not prevail because "the state of Florida is governed by the Florida Senate and the Florida House of Representatives." *Ibid.*

Appellants also contend (Br. 35) that the plaintiffs "waived any claims of vote dilution outside Dade * * * Count[y]" and cite several passages from the transcript in which the district court ruled out challenges to the districting in other areas of the State. No such waiver took place. To be sure, the cited transcript passages make clear that this case as tried involved only claims that additional Hispanic districts could be drawn in the Dade County area. The United States accordingly neither alleged nor attempted to prove that additional Hispanic districts could be drawn anywhere else in the State. But the claim that the United States *did* allege and prove was that the votes of Hispanics throughout the State were diluted. The fact that additional Hispanic districts could be drawn only in the Dade County area casts no doubt on that claim.

Appellants also argue (Br. 32-35) that the United States and the De Grandy plaintiffs failed to prove that Hispanics throughout the State are cohesive. But appellants' own expert testified that "generally speaking voting did tend to be polarized in Florida" (J.A. 347) and that while Hispanics are less cohesive than blacks, "the majority of Hispanics tend to vote for Hispanics." J.A. 266. Moreover, the State had already conceded that Hispanics were generally cohesive throughout the State in the congressional redistricting phase of this case. 92-519 J.S. App. 79a. Given that concession, there was no need for further proof on that point. See Order of June 18, 1992, doc. 449, at 4 (taking judicial notice of congressional proceedings). We do not quarrel with appellants' point that not all Hispanics throughout the State

are cohesive. But under *Gingles*, unanimity is not the test. Plaintiffs must show that minority group members are cohesive to a significant degree. 478 U.S. at 56. That standard was satisfied here.[13]

## II. THE DISTRICT COURT'S FINDING THAT HISPANICS COULD CONSTITUTE A VOTING MAJORITY IN TWO ADDITIONAL DISTRICTS IS NOT CLEARLY ERRONEOUS

Appellants argue (Br. 39-44) that the district court's finding that Hispanics constitute a voting majority in the 11 districts proposed in the De Grandy plan is clearly erroneous. That argument is without merit.

A. In resolving this issue, the district court first took into account experience from other cases indicating that when Hispanics constitute more than 60% of the VAP, they are likely to constitute a voting majority. J.S. App. 31a-33a, 39a-40a & n.28. Because Hispanics constitute more than 60% of the VAP in all of the De Grandy districts, that experience is relevant here. In fact, Hispanics constitute more than 64% of the VAP in all of the De Grandy districts. *Id.* at 68a. That evidence makes it all the more likely that Hispanics constitute a voting majority in those districts. Cf. *Brewer* v. *Ham*, 876 F.2d 448, 452 (5th Cir. 1989) (evidence that blacks constitute a supermajority of the total population is

[13] Appellants argue (Br. 35) that Hispanic-supported candidates are not usually defeated by bloc voting. In fact, however, appellants cite only one example of an Hispanic-supported candidate who was elected in a district in which Hispanics did not constitute a voting majority. Thus, what is true in Dade County is also true statewide: non-Hispanics usually vote sufficiently as a bloc to defeat Hispanic-preferred candidates unless those candidates run from majority-Hispanic districts.



sufficient to show that they constitute a voting majority).

Second, the district court considered actual election returns showing that Hispanic-preferred candidates have consistently won in districts in which Hispanics constitute more than 59% of the VAP, as is true in the De Grandy districts. J.S. App. 36a-37a, 57a. Because voting in Dade County is highly polarized, such evidence further supports the conclusion that Hispanics constitute a voting majority in those districts. *Westwego Citizens For Better Gov't* v. *Westwego*, 906 F.2d 1042, 1046-1047 (5th Cir. 1990).

Finally, the district court carefully examined evidence about where citizens and noncitizens are most heavily concentrated in Dade County. The court satisfied itself that none of the De Grandy districts has such a high concentration of recent immigrants as to call into question the conclusion that Hispanics constitute a voting majority. See J.S. App. 38a, 57a, 58a n.46, 69a-70a.

B. Appellants contend (Br. 41-42) that the so-called 60% rule was insufficient by itself to support a finding that Hispanics constitute a voting majority. But as the discussion above demonstrates, the court did not rely on that evidence alone. While the court used the 60% rule as one factor in its analysis, it also relied on evidence that Hispanics constitute more than 64% of the VAP in the De Grandy districts, that Hispanic-preferred candidates would have won if they had run in the De Grandy districts, and that the Hispanic VAP in the De Grandy districts is sufficient to account for the higher concentrations of noncitizens in certain of those districts.

C. Appellants also contend (Br. 42) that the district court clearly erred in relying on actual elec-

tion experience showing that Hispanic-preferred candidates would have won if they had run in the De Grandy districts. By relying on such evidence, appellants contend, the district court implicitly recognized a right under Section 2 to "influence" districts—*i.e.*, districts in which minority group members constitute a voting *minority*, but can still elect candidates of their choice because of crossover voting. See *Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1155, 1157 (1993). But the district court did not rely on the election evidence to conclude that the De Grandy districts are "influence" districts. Rather, it viewed that evidence as one factor suggesting that Hispanics constitute a voting *majority* in those districts. That inference was a permissible one. As this Court has recognized, evidence that minority group members constitute a voting majority supports the conclusion that they have the potential to elect candidates of their choice. *Growe*, 113 S. Ct. at 1084. The converse is also true: evidence that minority group members can elect their preferred candidates despite polarized voting tends to establish that they constitute a voting majority.[14]

D. Finally, appellants argue (Br. 41-42) that the district court erred in failing to credit their expert's opinion that Hispanics constitute a voting majority in only three of the 11 De Grandy districts. In appellants' view (Br. 41), their expert's opinion should have been treated as conclusive because it was based on "actual data."

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[14] Because the district court did not find a violation of Section 2 based on the State's failure to create "influence" districts, the question whether such claims will lie under Section 2 is not presented here. As appellants note (Br. 42 & n.68), this Court has reserved that question. *Voinovich*, 113 S. Ct. at 1155.



Appellants' expert did not, however, produce actual data regarding the percentage of Hispanics eligible to vote in each De Grandy district. Such data were not available. See J.S. App. 74a (Vinson, J., concurring). Appellants' expert began with the overall citizenship rate in Dade County, which he obtained from the Census; he then performed a regression analysis to estimate the percentage of Hispanic and non-Hispanic citizens in Dade County; and, as a final step, he used those county-wide figures to estimate the Hispanic citizen VAP in each De Grandy district. 92-519 J.S. App. 187a-198a; see J.S. App. 74a (Vinson, J., concurring). Accordingly, what appellants refer to as "actual data" are really estimates derived from estimates.

In addition, the analysis performed by appellants' expert was seriously flawed. It relied upon a county-wide Hispanic citizenship rate that was subject to a high rate of error. See J.S. App. 74a (Vinson, J., concurring). It did not attempt to deal with possible variations at the district level. *Id.* at 38a n.26. And it took no account of other evidence in the record. In particular, the expert's analysis posited that districts in which Hispanics constitute 66% of the VAP would nevertheless be less than 50% Hispanic among eligible voters, *id.* at 38a, even though election returns establish that any district in which Hispanics constitute more than 65% of the VAP is a "safe" Hispanic seat. *Id.* at 37a; see generally *id.* at 74a-75a (Vinson, J., concurring). Given those deficiencies, the district court reasonably concluded that appellants' evidence did not overcome the plaintiffs' showing that Hispanics constitute a voting majority in the 11 De Grandy districts.

### III. THE DISTRICT COURT CORRECTLY REFUSED TO GIVE PRECLUSIVE EFFECT TO THE FLORIDA SUPREME COURT'S DETERMINATION THAT THE HOUSE PLAN DID NOT VIOLATE SECTION 2

In accordance with its responsibilities under the Florida State Constitution, the Florida Supreme Court reviewed the State's reapportionment plan and issued a final judgment upholding its validity.[15] 92-519 J.S. App. 104a-138a. The De Grandy plaintiffs were parties to that proceeding, and they urged the Florida Supreme Court to find that the plan did not comply with Section 2 of the Voting Rights Act. Because the Florida Supreme Court determined that the plan did not "discriminate against minorities," *id.* at 119a, appellants argue (Br. 45-46) that the Full Faith and Credit Statute, 28 U.S.C. 1738, and principles of res judicata precluded the De Grandy plaintiffs from relitigating their Section 2 claim in federal court. Appellants are incorrect.

A. Parties to a proceeding are bound by the judgment only when they have had a full and fair opportunity to litigate the claim resolved by the judgment. See *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 480-481 & n.22 (1982); *Allen* v. *McCurry*, 449 U.S. 90, 95 (1980). The De Grandy plaintiffs did not have such an opportunity. In particular, the Florida Supreme Court did not afford the De Grandy

[15] Review was conducted pursuant to Fla. Const. of 1968, Art. III, § 16(c), which provides that the Attorney General of Florida "shall" petition the Florida Supreme Court for "a declaratory judgment determining the validity of [a legislative] apportionment" within 15 days after its enactment, and that the Florida Supreme Court "shall permit adversary interests to present their views and, within thirty days from the filing of the petition, shall enter its judgment."



plaintiffs an opportunity for a trial on their Section 2 claim before it rendered its judgment. Moreover, the Florida Supreme Court specifically refrained from making the sort of factual findings necessary to resolve that claim, stating that "it [wa]s impossible for [it] to conduct the complete factual analysis contemplated by the Voting Rights Act * * * within the time constraints of [the Florida Constitution]." 92-519 J.S. App. 113a. In concluding that the House plan did not discriminate against minorities, the Florida Supreme Court conducted only a limited review of that issue based on written submissions. *Id.* at 119a.

Appellants do not argue that the De Grandy plaintiffs had a full and fair opportunity to litigate their Section 2 claim before the Florida Supreme Court rendered its final judgment. Rather, they cite (Br. 45) the Florida Supreme Court's willingness to conduct a *post*-judgment trial on that claim. The fact remains, however, that the Florida Supreme Court rendered the final judgment to which appellants seek to give preclusive effect without having held a trial. Appellants cite no authority for that result.[16]

B. In any event, the United States was not a party to the proceeding before the Florida Supreme Court. As appellants appear to concede (Br. 45 & n.72), the United States therefore could not be bound by that court's judgment. *Martin* v. *Wilks*, 490 U.S. 755, 761 (1989). For that reason, in the analogous context of cases arising under Section 5 of the Voting Rights Act, this Court has specifically held that "[t]he Attorney General is not bound by the resolution of

[16] *Kremer* v. *Chemical Construction Corp.*, 456 U.S. at 485, cited by appellants (Br. 45), is inapposite. In *Kremer*, the plaintiff was given a full and fair opportunity to litigate his claim before a final judgment was rendered.

* * * issues in cases to which he was not a party." *Hathorn* v. *Lovorn*, 457 U.S. 255, 269 n.23 (1982).

Appellants nonetheless contend (Br. 46-47) that the United States should have been precluded from bringing its Section 2 claim by the so-called *Rooker-Feldman* doctrine. See *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 482 (1983); *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). That doctrine precludes federal district courts from engaging in appellate review of state court judgments. That doctrine is inapplicable here.

First, in both *Rooker* and *Feldman*, a *party* to a state (or District of Columbia) court proceeding sought review of that court's judgment in federal district court as a *substitute* for a direct appeal to this Court. This Court held that under 28 U.S.C. 1257, the exclusive way for a party to challenge a state court judgment is through a direct appeal to this Court. *Feldman*, 460 U.S. at 476, 482; *Rooker*, 263 U.S. at 416. Because the United States was not a party to the Florida Supreme Court proceeding, it did not have an opportunity to appeal that court's judgment to this Court. Accordingly, the United States' original action in federal district court cannot be viewed as an effort to circumvent 28 U.S.C. 1257.

Second, in both *Rooker* and *Feldman*, the parties directly attacked the state court's judgment in federal court. In *Rooker*, the plaintiffs brought "a bill in equity to have a judgment of a [state court] declared null and void." 263 U.S. at 414. In *Feldman*, the plaintiffs filed suit against the District of Columbia Court of Appeals and directly challenged the refusal of that court to admit them to the bar. 460 U.S. at 468 & n.2, 472 & n.8. In this case, by contrast, the United States did not directly attack any ruling of the Florida Supreme Court. Instead, it sought to litigate de novo its claim that the State's redistricting plan for the Florida House of Representatives violates Section 2.



Appellants attempt to stretch the *Rooker-Feldman* doctrine far beyond its limited reach. Under their view of the doctrine, state court judgments would bind everyone, including those who were not parties to the litigation. Cf. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483 (1942) (state court precedents do not bind federal courts). That would make the Full Faith and Credit Statute and principles of res judicata superfluous. It also would effectively negate Section 12(f) of the Voting Rights Act, 42 U.S.C. 1973j(f), which confers on the United States unqualified authority to file a suit under Section 2 in federal district court. And it would conflict with the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litgation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). Appellants' extreme and unjustified interpretation of the *Rooker-Feldman* doctrine should be rejected.[17]

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[17] Appellants argue (Br. 46 n.73) that principles of federalism required the district court to dismiss plaintiffs' Section 2 claims. But as this Court explained in *Growe*, federalism principles do not require dismissal in this context. 113 S. Ct. at 1080. Rather, they require a federal district court to wait until the state court has reached a final determination (assuming there is sufficient time), and to give that judgment the effect required by the Full Faith and Credit Statute. *Id.* at 1080-1083. The district court acted in compliance with those principles.

## IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN IMPOSING THE MODIFIED DE GRANDY PLAN AS A PERMANENT REMEDY

Appellants argue (Br. 47-49) that the district court erred in adopting the modified De Grandy plan as a remedy. They first assert (Br. 48) that the district court did not give them an opportunity to introduce their own remedial plan. That assertion is inaccurate. The district court permitted appellants to introduce two remedial plans. J.S. App. 68a-69a. Appellants do not take issue with the district court's conclusion that neither of those plans adequately remedied the violation the court found. See *id.* at 68a-70a.

Appellants next contend (Br. 48-49) that the court's remedial plan interferes with state policy more than necessary to remedy the violation, because it deviates from the State's plan in areas outside of Dade County. The district court found those adjustments to be both minimal and necessary to comply with one-person, one-vote requirements. J.S. App. 70a-71a.

Although appellants have not demonstrated that the district court's findings concerning the remedial plan are clearly erroneous, they do argue with considerable force that the district court's proceedings were inadequate, because they did not afford appellants an adequate opportunity to litigate issues concerning the effects of the modified De Grandy plan outside Dade County. See Br. 48-49. Specifically, they point out that they did not receive the modified De Grandy plan until the beginning of the remedial hearing, that the proponent of the plan addressed the court in a narrative fashion from the podium, and that they had no opportunity to cross-examine him.



We agree with appellants that the district court did not conduct the kind of remedial proceeding that should precede the adoption of a permanent remedial plan. To be sure, the district court was required to act expeditiously if it was to afford relief in time for the upcoming elections. Moreover, appellants complicated the district court's task when they introduced two remedial plans that failed to remedy the violation and then refused to accept (until after the court had reached its decision) another alternative proposed by the United States, under which they would have had the opportunity to draw a new plan that incorporated the 11 majority-Hispanic districts proposed by the De Grandy plan into the State's plan as appellants saw fit. See pp. 7-8, *supra*. In those circumstances, the district court did not abuse its discretion in imposing the modified De Grandy plan for the 1992 elections. See *Upham* v. *Seamon*, 456 U.S. 37, 44 (1982) (per curiam) (when elections are imminent, district court has authority to order elections to be held in accord with plans "that do not in all respects measure up to the legal requirements").

The district court did not, however, simply impose the modified De Grandy plan for the 1992 elections; it imposed that plan for post-1992 elections as well. We agree with appellants that the district court should not have taken that action without first conducting a more complete (and less hurried) proceeding to determine whether the modified De Grandy plan disrupted state policy more than necessary to remedy the violation. Accordingly, to the extent that the district court's judgment imposes the modified De Grandy plan for post-1992 elections, it

should be vacated and the case should be remanded for further remedial proceedings.[18]

## CONCLUSION

The district court's finding of liability should be affirmed. The district court's judgment should be vacated as to the remedy, and the case should be remanded for further proceedings on the question of the proper remedy for post-1992 elections.

Respectfully submitted.

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[18] In the United States' appeal from the district court's judgment concerning the Florida Senate, we similarly argue that the district court erred in adopting the State's plan on a permanent basis without affording the United States and the De Grandy plaintiffs a full opportunity for a hearing on the remedial issues. See 92-767 & 92-593 U.S. Br. 15-16, 18-19.

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